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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 785

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Pet. App. B) is reported at 271 F. 2d 752. The opinions and orders of the Civil Aeronautics Board (J.A. 1313a–1400a, 1469a–1497a, 1509a–1536a) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1959, and a petition for rehearing was denied on December 15, 1959. The petition for a writ of certiorari was filed on March 14, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board made adequate findings in support of its conclusions that the public convenience and necessity required various services competitive with those of petitioner.

2. Whether the Board must consider a claim of mutual exclusivity between new route applications where the carrier urging exclusivity fails to avail itself of the opportunity expressly given it to support its claim in the hearing on the allegedly conflicting application.

3. Whether due process is denied an applicant in a comparative route proceeding by the issuance by the Board, prior to the preparation and entry of its final opinion and order, of a press release stating the Board's tentative vote.

4. Whether the submission to the Board of a telegram from an aircraft manufacturer, sent at an applicant's request, relating to the applicant's proposed acquisition of new equipment and relevant to other Board functions, required disqualification of the applicant, or a reopening of the Board's proceeding to determine whether the telegram represented an attempt to influence the Board by *ex parte* submissions.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Civil Aeronautics Act and the regulations of the Board thereunder are set forth in Appendix A to the petition.[1]

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[1] On December 31, 1958, after issuance of the Board's decision, the Civil Aeronautics Act was superseded by the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301, *et*

STATEMENT

The agency proceeding in issue here involved consideration of applications for new trunkline air route authority in the Civil Aeronautics Board's *Great Lakes-Southeast Service Case.* After hearing and full administrative proceedings, the Board, by decision of September 30, 1958 (J.A. 1375a), made awards (1) to Northwest Airlines for a route between Chicago and Miami, (2) to Delta Air Lines for a route between Detroit and Miami, and (3) to Capital Airlines for routes between Cleveland, Pittsburgh and Miami, and between Buffalo and Miami. The grants in each case were made over the opposition of petitioner, which was already authorized to operate over the first three of the above routes and was an unsuccessful applicant in the proceeding for the Buffalo-to-Miami route. The Court of Appeals for the Second Circuit affirmed (Pet. App. B 1–13).

1. In order to limit the proceeding to manageable proportions, the Board consolidated for hearing only those applications that related to the area bounded on the north by the cities of Chicago, Detroit and Buffalo, and on the west by Indianapolis, Ind., Louisville, Ky., and Atlanta, Ga. (J.A. 82a).[2] Prior to the hearing Eastern attempted to broaden the proceedings to include consideration of certain applications which it had filed for service to the west and northwest of Chicago into areas already served

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seq.). There were no substantive changes in the statutory provisions here pertinent.

[2] Reference to the printed Joint Appendix below are given as "J.A. ——."

by applicants for the Chicago-to-Miami route, including the successful applicant Northwest. Under established Board procedures, existing air carriers receiving new routes connecting with those they already have may, in the absence of contrary restrictions, combine the new authority with the old, and thus provide single carrier or single plane operation between cities already served by them outside the area to which the proceeding was limited and cities on the new routes.

Eastern already served the southeast cities sought by the applications that had been consolidated for hearing. It contended that, since traffic would move between cities outside the area of the proceeding and cities on any new routes such carriers would secure in the southeast, it was entitled under the *Ashbacker* principle [3] to have its applications to extend its service from the southeast into the areas already served by the applicants for Chicago-to-Miami authority consolidated into the proceeding for comparative hearing therein (J.A. 91a–105a). The Board denied this consolidation request on the ground that the proceeding would be unduly broadened to include "nearly every major traffic point in the country" (J.A. 118a). It took steps, however, to minimize the impact of any grants upon Eastern's applications by stating in advance that non-stop flights between cities on existing routes outside the area of the proceeding and cities on any of the southeast routes to be authorized would not be permitted (J.A. 83a, 89a–90a). It also pro-

[3] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327.

vided that the parties (including Eastern) would be entitled "to urge the mutual exclusivity of their respective proposals" in the course of the proceeding (J.A. 83a).[4]

Eastern did not introduce evidence in support of its claims of mutual exclusivity. Although the examiner specifically ruled that Eastern could explore the mutual exclusivity issue as a matter of economic fact (J.A. 176a–177a), Eastern took the position that the Board or the applicants with beyond-area routes were under a legal duty to rebut or disprove its bare assertions of conflict. In certificating Northwest, the Board rejected Eastern's contentions both on the grounds that exclusivity had not been established and that it did not exist (J.A. 1482a–1484a).[5]

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[4] Eastern unsuccessfully sought review of the Board's consolidation order. *Eastern Air Lines* v. *Civil Aeronautics Board*, 243 F. 2d 607. The Court dismissed the petition as one for review of an interlocutory order; it also indicated its disagreement with the theory upon which Eastern sought consolidation.

[5] The Board pointed out that the certification of Northwest would leave untouched numerous service needs which would be decisive of whether there should be additional operations between Chicago and the Pacific Northwest. Further, Eastern's principal contentions concerning Northwest's application were that Eastern would be precluded from an extension from Chicago to the Twin Cities. The Board pointed out that Eastern was in fact receiving comparative consideration in relation to the Chicago-Twin Cities route in another pending proceeding. In point of fact, the Board subsequently found a need for two additional carriers over this route, one unrestricted and one with certain conditions. See *Chicago-Milwaukee-Twin Cities* Case, C.A.B. Order No. E–13890, decided May 19, 1959. Eastern received the restricted award, but was afforded full comparative consideration for the unrestricted one.

2. Just prior to the oral argument before the Board on exceptions to the examiner's opinion, the Board received a telegram from the General Dynamics Corporation, manufacturer of Convair planes, advising the Board of a proposed equipment purchase by Capital Airlines, one of the applicants in the consolidated proceeding (J.A. 1498a). In its opinion on reconsideration (J.A. 1488a–1490a), the Board considered and rejected Eastern's argument that this telegram, which General Dynamics stated had been sent "at the suggestion of Capital" (J.A. 1498a), constituted an improper *ex parte* attempt by Capital to influence the Board's determinations. Pointing out that it had considered Capital's fitness to receive an award wholly on the basis of the record evidence, and that its knowledge of the Capital-General Dynamics negotiations, obtained from trade press reports as well as the telegram, had not affected its decision in any way, the Board held that it "cannot conclude that Capital's conduct in regard to this matter renders it unfit" to receive the routes awarded to it (J.A. 1490a, n. 26a). It pointed out that the Capital-General Dynamics negotiations had raised questions under Section 408 of the Civil Aeronautics Act as to the existence of a control relationship between those two parties, which had become the subject of correspondence with Capital and General Dynamics (J.A. 1499a–1500); and that the negotiations had also been the subject of testimony in the Board's then pending General Passenger Fare Investigation.

3. Approximately two months after the oral argument, but before the preparation and publication of its final opinion and order, the Board issued a press release announcing its tentative vote in the case (J.A. 1275a–1281a, 1495a). The issuance of such press releases in major proceedings, which are designed to prevent "leaks" to the public of the Board's tentative decisions, has been the agency's consistent practice since 1956.

4. The issues raised in Eastern's petition to review in the court of appeals included the four questions here presented. In rejecting these contentions and unanimously affirming the Board, the court held (1) that the Board's findings as to the adequacy of the size of the markets to support the additional competition certificated therein were "adequately stated and supported by substantial evidence" (Pet. App. B 10); (2) "that in an area proceeding where an applicant objects to the exclusion of his application by a consolidation order, and does not submit evidence [at the hearing] in support of his objection, the agency may treat the objection as not having been made" (Pet. App. B 6); (3) that Eastern had not been denied a fair hearing by the Board's making public its tentative decision, since it expressly did not preclude a changed vote if subsequent "marshaling of facts * * * indicated that a different decision was proper" (Pet. App. B 7); and (4) that the General Dynamics-Capital communication to the Board "was not improper, for such information was relevant to Board functions unconnected with the *Great Lakes-Southeast Service* case * * * [and] [t]here is no indi-

cation that Capital made any covert communications to members of the Board * * *" (Pet. App. B 9).[6]

ARGUMENT

1. The first three of the four grounds advanced by petitioner as warranting review are, as it states (Pet. 15), also presented in its petition for certiorari in No. 777, this Term, in which review is sought of the decision of the Court of Appeals for the District of Columbia Circuit in *Delta Air Lines* v. *Civil Aeronautics Board* (Pet. App. C). For the reasons set forth in the Board's Memorandum filed in that case, we think the court of appeals in the instant case correctly resolved each of these questions adversely to petitioner. Certiorari should therefore be denied with respect to (1) the alleged inadequacies of the findings of the Board as to the need for additional service on the routes in issue (see pp. 11–14 of our Memorandum in No. 777),[7] and (2) the claim

[6] A separate petition for a writ of certiorari to review the judgment in the instant case has been filed by Capitol Airways, an unsuccessful applicant for routes between Chicago and Miami and Detroit and Miami in the Board proceeding below (No. 786, this Term). The instant petition, however, presents no issues raised by Capitol. See the Board's brief in opposition in No. 786. Eastern's appeal was considered separately by the court below (see Pet. App. B 3–10) from that of Capitol (Pet. App. B 10–12).

[7] Here, the revenue and cost estimates of the parties were stated and considered (J.A. 647a–648a, 675a–680a, 710a–712a). Among other things, the Board set forth in tabular form estimates of total traffic and the participation therein by the various carriers, together with the revenues therefrom (J.A. 1480a, 1491a–1493a). Eastern's financial position was fully evaluated (J.A. 929a–931a), and it was found that the carrier would not be seriously effected by the competition. Indeed,

that the public announcement of the Board's tentative vote on instructions to its staff deprived Eastern of a fair hearing (*id.*, pp. 14–15).

Moreover, as stated in that Memorandum, we think the court below here properly rejected the so-called *Ashbacker* issue raised by petitioner's question No. 2 (Pet. 2–3, 19–22). The court correctly ruled that Eastern's failure to take advantage of the opportunity given it to introduce evidence at the hearing to support its claim that its applications, excluded from the hearing, were in fact mutually exclusive with the awards made therein, was "fatal to Eastern's *Ashbacker* contentions" (Pet. App. B 5–6). As indicated in the Memorandum, we do not think that the determination of the court below on this point was necessarily inconsistent with the determination on Eastern's similar claims in the *Delta* case, *supra*. For the holding there may well have reflected the erroneous belief of that court that the Board, in that case, had not made it sufficiently clear to the parties that failure to introduce evidence of mutual exclusivity at the hearing would forestall later claims thereon. However, should this Court grant the petition for a writ of certiorari with respect to question No. 2 in No. 777, then it should also grant certiorari here on question No. 2.

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the Board found that, because of increasing traffic growth, Eastern would still receive more revenue with competition on the basis of 1958 data than it received without competition in 1956 (J.A. 1493a). Eastern's complaint is only that the Board did not set forth in similar form the precise estimates of future expenses and capacity by Eastern and the successful applicants.

2. Petitioner's claim that a telegram, sent by General Dynamics at Capital's behest (J.A. 1498a), to advise the Board of the arrangement between General Dynamics and Capital for acquisition of aircraft, constituted an improper attempt at *ex parte* influence by Capital, was rejected by the Board (J.A. 1488a–1490a) and the court below (Pet. App. B 8–9). The Board, after fully considering the charges, expressly stated (J.A. 1489a–1490a) that the General Dynamics telegram "did not affect our decision in any way" and that "our deliberations were guided only by the record evidence." The Court of Appeals, on review of the record, found "no reason to doubt" the Board's representation that its decision "was uninfluenced by the announcement of Capital's equipment acquisition program," and "no indication that Capital made any covert communications to members of the Board" (Pet. App. B 9). The court further pointed out that the telegram did not refer to the pending *Great Lakes-Southeastern* case and that it was relevant to other pending Board matters, including the comprehensive investigation of passenger fares then pending before the Board and the question whether the financial arrangements for the proposed equipment acquisition program involved an acquisition of control of Capital which required Board approval under Section 408 of the Civil Aeronautics Act, 49 U.S.C. (1952 ed.) 488. Accordingly, Capital had valid reasons, wholly apart from the instant case, to request General Dynamics to confirm to the Board matters which were the subject of widespread comment in the trade press. See *Van Curler Broadcasting Corp.* v. *United States,* 236

F. 2d 727, 730 (C.A. D.C.), certiorari denied, 352 U.S. 935.[8]

Petitioner contends that the sending of the telegram at Capital's request also raised a question as to Capital's possible fitness to receive the award. The court of appeals held, however, that a remand to the Board to take evidence upon this question was not called for because of the absence of "indication that Capital made any covert communications to members of the Board" (Pet. App. B 9). Since this question related to facts that were known to both the agency and the reviewing court, this case is significantly different from cases such as *Sangamon Valley Television Corp.* v. *United States,* 358 U.S. 49, and *WKAT, Inc.* v. *Federal Communications Commission,* 258 F. 2d 418 (C.A. D.C.). There cases were remanded to the Federal Communications Commission to consider charges, made for the first time while it was pending before the courts, that applicants or their representatives had made covert presentations on the merits to individual commissioners.

The law with respect to the effect of *ex parte* contacts with administrative agencies during contested administrative proceedings is presently in the course of development. Of necessity, the application of

[8] There is no basis for Eastern's suggestion (Pet. 8, 32–33) that the telegram, or other publicity concerning the Capital-General Dynamics deal, was responsible for the shift in Board counsel's position back to one favoring the Capital application. On the contrary, he clearly stated at oral argument that his switch resulted from (1) Capital's withdrawal of a subsidy application and (2) the Board's approval of a 6.6% passenger fare increase which would increase Capital's revenues by about $5,000,000—both matters of official notice (J.A. 1202a–1204a).

broad general principles in this area to particular factual situations must be developed on a case-by-case basis, and such development is a matter initially for the courts of appeals. The Court of Appeals here did not purport to enunciate any novel doctrine. It merely held that, on the facts shown by this record, there was no need for further agency proceedings to develop any additional facts with respect to the sending of the General Dynamics telegram. In these circumstances, we submit that there is no occasion for further review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. However, if the Court should grant the petition with respect to the second question presented in No. 777, it should also grant the instant petition with respect to the second question presented.

Respectfully submitted.

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